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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

NO. _____, Misc., October Term 1979

JOHN GREGORY WATKINS,

Petitioner

V.

DONALD E. BORDENKIRCHER, WARDEN,

Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR SIXTH CIRCUIT
(AND APPENDIX)

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CERTIFICATE

I do hereby certify that a copy of this petition was served by depositing the same in a United States mail box, with first class postage prepaid, to Hon. Victor Fox, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on January 16, 1980.

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3-5
REASONS FOR GRANTING THE WRIT	6-21
CONCLUSION	22
APPENDIX	attached

TABLE OF POINTS AND AUTHORITIES

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935)	18, 19
Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978)	8
Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973)	19
Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 257 (1973)	17
Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 623, 99 L.Ed.2d 942 (1955)	17-19
Dixon v. Commonwealth, Ky., 505 S.W.2d 771 (1974)	8
Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969)	7
Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 18 L.Ed.2d 1178 (1967)	7
Haskins v. United States, 433 F.2d 836 (10th Cir. 1970)	9
Hayes v. Commonwealth, Ky., 467 S.W.2d 354 (1971)	8
In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed.2d 942 (1955)	17
In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948)	16
Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)	8
Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941)	17
Luckett v. Commonwealth, Ky., 550 S.W.2d 517 (1977)	8
Malley v. Connecticut, 414 F. Supp. 1115 (D. Conn. 1976)	19
Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974)	18

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) 8, 13

Myers v. Commonwealth, Ky., 489 S.W.2d 277 (1973) 8

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) 7,8

Pinto v. Pearce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967) 12

Pointer v. Texas, 380 U.S 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 17

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 16 L.Ed.2d 600 (1960) 17

Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) 8

Summitt and Watkins v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979) 1,5,12,20

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 908 (1964) 8

United States ex rel, Fisher v. Driber, 546 F.2d 18 (3rd Cir. 1976) 8, 12

United States ex rel. Phipps v. Follett, 428 F.2d 912 (2nd Cir.), cert. denied, 400 U.S.908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970) 9

United States v. Allison, 414 F.2d 407 (9th Cir.) cert. denied, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969) 9

United States v. Barker, 553 F.2d 1013 (6th Cir. 1977) 19

United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969) cert. denied, 396 U.S. 1017, 90 S.Ct. 581, 24 L.Ed.2d 508 (1970) 9

United States v. Cranson, 453 F.2d 123 (4th Cir. 1971), cert.denied, 406 U.S. 909, 92 S.Ct. 1067, 31 L.Ed.2d 821 (1972) 9

United States v. Mitchell, 540 F.2d 1163 (3rd Cir. 1976) 9

United States v. Raneiglo, 433 F.2d 228 (5th Cir.) cert. denied, 400 U.S. U.S. 959, 91 S.Ct. 358 27 L.Ed.2d 268 (1970) 9

United States. v. Sutherland, 428 F.2d 1152 (5th Cir. 1970) cert. denied, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972) 9

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) 7,9,11,12

Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943) 18

Watkins v. Commonwealth, Ky., 566 S.W.2d 630 (1978) 1,5

STATUTE

28 U,S.C. §1254(1) 1

CONSTITUTIONAL PROVISIONS

Sixth Amendment 2

Fourteenth Amendment 2

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, John Gregory Watkins, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which was entered in the case on October 19, 1979.

OPINIONS BELOW

The trial court did not render a written opinion in this case. The judgments of conviction in the trial court were entered on July 15, 1977 and are reproduced in the Appendix at 21-22. The Kentucky Supreme Court affirmed the judgment of the trial court in Watkins v. Commonwealth, Ky., 556 S.W.2d 630 (1978). This opinion is reproduced in the Appendix at 19-20.

A petition for a writ of habeas corpus was filed in the United States District Court for the Western District of Kentucky at Louisville. The petition was dismissed in a memorandum opinion. The opinion and judgment entered by the the United States District Court are reproduced in the Appendix at 11-18. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court in Summitt and Watkins v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979). The opinion and judgment of the United States Court of Appeals for the Sixth Circuit are reproduced in the Appendix at 1-9.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court was entered on October 19, 1979 and this petition for a writ of certiorari is timely filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. DOES CONSTITUTIONAL DUE PROCESS OF LAW REQUIRE A STATE TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE AND DID THE FAILURE TO SUPPRESS THE IDENTIFICATION AFTER ITS UNRELIABILITY WAS DISCOVERED AT TRIAL DEPRIVE THE PETITIONER OF A FAIR TRIAL CONSONANT WTIH DUE PROCESS OF LAW?

II. DID THE CLOSING ARGUMENT OF THE PROSECUTOR DEPRIVE THE PETITIONER OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL BASED SOLELY UPON THE EVIDENCE AGAINST HIM?

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction hereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The petitioner, John Gregory Watkins, was indicted by the March 1975 term of the Jefferson County Grand Jury on one count of armed robbery and one count of first degree assault (Transcript of Record 153965 at p. 2, hereinafter referred to at TR 153965). The January 1977 term of the Jefferson County Grand Jury returned another indictment charging Watkins with one count of bail jumping. (Transcript of Record 158242 at p. 2, hereinafter referred to at TR 158242). On June 20 and 21, 1977, the cases were jointly tried before a jury.

The evidence for the prosecution tended to establish that on January 11, 1975 at approximately 11:30 p.m. an attempted robbery occurred at the Thoroughbred Liquor Store in Louisville, Kentucky. Walter Smith, an employee and part-owner, and Donald L. Goeing, Jr., were working in the store when three or four black males entered the store (Transcript of Evidence p. 21, 51, hereinafter referred to as TE). Smith testified that one of them approached the counter, asked for a pack of cigarettes, and when Smith turned around, said "this is a hold up." (TE 21). Goeing was refilling the soda machine at this time, and when the assailant saw some movement in that direction, he stated: " I said don't reach for anything" and fired two shots at Goeing (TE 23-24). One shot hit Goeing in the arm and the other went through the right ventricle of his heart (TE 48). Goeing was hospitalized for twelve days and recovered after a three and a half month convalescence (TE 48).

The evidence against Watkins was based solely on identifications made by Smith and Goeing (TE 21, 47-48). Defense counsel submitted a written pre-trial motion for a suppression hearing on the identification testimony (TR 153965, 28-29). Before any evidence was heard, this motion was reasserted in court, out of the presence of the jury, and was

overruled (TE 2, 9). Prior to testimony and identification by Smith and Goeing, defense counsel objected to not being allowed an in camera hearing, since it forced him to explore the circumstances of the line-up and show-up in the presence of the jury (TE 24), but his objections were overruled (TE 21,24). Repeatedly defense motions for a mistrial on the same basis were overruled (TE 24, 28, 98). A review of the identification testimony at trial follows.

Smith gave a description to the police on the evening of January 11, 1975, which described the assailant as a light-skinned black male, thirty-five years old, approximately five feet, nine inches tall (TE 34-35). According to his testimony, Goeing saw his assailant for about five seconds before he lost consciousness (TE 49-51). On the day of his arrest, Watkins was placed in a three man lineup with two dark-skinned black males and identified by Smith (TE 41-43). Smith testified that at the time he made the identification he "wasn't completely sure" but that later on, when he "got himself together," he was sure (TE 43). Watkins was then taken to the hospital in the custody of two police officers to be viewed by Goeing in his hospital bed. Goeing had been informed that the police were "going to let him see someone that he could identify." (TE 54-55). Goeing testified that, at the time of his identification, he stated: "...it could have been close enough that it could have been his twin brother, it could have been somebody else." (TE 55). Goeing stated that he had seen Watkins nine or ten times in court since that time (TE 55). No other arrests were made in the case, and no photographs or other possible suspects were shown to Smith and Goeing (TR 71,74).

Watkins took the stand in his own behalf and testified that he had not been involved in the crime (TE 122, 124). Watkins stated that on the evening in question he had played pool with David English and Gerald Redman. He then spent the remainder of the night with English, who was his cousin (TE 123) Watkins' whereabouts were confirmed by the testimony of David

English and Gerald Redman (TE 99-113). Anthony Dove was also called by the defense and testified that he was in Thoroughbred Liquor Store on the evening of January 11, 1975, and that Watkins was not the man who shot Donald Goeing, Sr. (TE 116-117).

In closing argument, the prosecutor stated that, by finding Watkins guilty and giving him the maximum sentence, the jury could get "the message across" from "the Governor on down, that we don't want this man or men like him in our community " (TE 175). The defense objected to this line of argument as inflammatory and was overruled (TE 176). The prosecutor then proceeded to exhort the jurors: "This is your chance to get them out of here. This is your chance " (TE 176). He concluded with the statement: "Don't think this is being harsh. This is the only way you can get the message across. These babies are tough " (TE 178). At the conclusion of its thirty minute deliberation, the jury returned a verdict of guilty on all counts and recommended the maximum sentence on each count (TE 180-181).

The judgment of the trial court was affirmed by the Supreme Court of Kentucky in Watkins v. Commonwealth, Ky., 565 S.W. 2d 630 (1978). A petition for a writ of habeas corpus was filed, pursuant to 28 U.S.C. § 2254, with the United States District Court for the Western District of Kentucky at Louisville. The petition for a writ of habeas corpus was dismissed by the district court and the United States Court of Appeals affirmed the dismissal in Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979). This petition for a writ of certiorari is from the order of the United States Court of Appeals affirming the petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS NOT SPECIFICALLY ADDRESSED THE QUESTION OF WHETHER CONSTITUTIONAL DUE PROCESS OF LAW REQUIRES A STATE TRIAL COURT TO CONDUCT A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE THE ADMISSIBILITY OF IDENTIFICATION EVIDENCE. FURTHERMORE, THERE APPEARS TO BE A CONFLICT BETWEEN CIRCUIT COURTS OF APPEALS ON WHETHER SUCH A HEARING IS CONSTITUTIONALLY REQUIRED. THE CASE AT BAR REFLECTS THE NECESSITY TO RESOLVE THIS ISSUE.

At trial, after the jury was sworn but prior to the opening statements in the case, counsel for John Watkins moved for an in camera hearing to review the suggestive procedures by which Watkins was identified (TE 11). This motion was overruled. Subsequently, the in-court identification was admitted over the objection of defense counsel (TE 21). A short time later, when Watkins' counsel cross-examined the prosecuting witness, he articulated for the record his need for a hearing and the prejudice he felt in the denial of his motion by the court (TE 24):

> MR. SOUTHARD: I'm going to have to explore testimony of the line-up and the show-up that I feel like I shouldn't have to do in front of the jury. And I just want to again make my objection for the record to not being allowed to have a hearing.

Defense counsel again reiterated this objection after his cross-examination of the second prosecuting witness. (TE 58):

> MR. SOUTHARD: Your Honor, prior to the testimony of these two witnesses, I made an objection. And I would again renew my objection to having to bring out that testimony and move for a mistrial.

At the close of the prosecution's case, counsel for Watkins once again renewed his motion (TE 93):

> ...I would also move for a mistrial based on the admission of the identity testimony without allowing an out of court hearing as to that testimony, especially since he was not represented at the line-up by counsel.

Finally, at the close of the defense, counsel renewed his previous motion (TE 144). All of these motions were overruled.

In Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), at 388 U.S. 272, the court addressed the problem of identification testimony and held that the "admission of in-court identification without first determining that they were not tainted by the illegal line-up but were of independent origin was constitutional error."

In a more general manner, the procedures to be used in determining the admissibility of identification testimony have been developed in a series of Supreme Court decisions, beginning with United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). If a hearing to determine the admissibility of an identification is not held, the court noted in Wade, at 388 U.S. 240, 87 S.Ct. 1939:

> The state may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself - realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal the unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification.

In Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), the court held that the "totality of the circumstances" surrounding a pretrial identification should be scrutinized by the trial court to ensure that the identification was not so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to a denial of due process. Refining this standard in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the court said, at 409 U.S. 200, 93 S.Ct. 382:

> . . . .the facts to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation.

In Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the court reiterated that "reliability is the linchpin in determining the admissibility of identification testimony" and that the facts to be considered are those set out in Biggers. Implicit in all of these holdings is that the admissio of the in-court identification without first determining that it was not tainted was constitutional error. See also Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); Dixon v. Commonwealth, Ky., 505 S.W.2d 771 (1974). If the initial confrontation is constitutionally impermissible, then all subsequent identifications are also subject to attack. Hays v. Commonwealth, Ky., 467 S.W.2d 354 (1971).

In the case at bar, when trial counsel contested the admissibility of the identification, due process required a reliable determination of the disputed fact. Procedurally, the test of reliability has been interpreted as requiring a hearing out of the presence of the jury. In Kentucky, this preferred procedure has been enunciated in Luckett v. Commonwealth, Ky., 550 S.W.2d 517 (1977); Myers v. Commonwealth, Ky., 499 S.W.2d 277 (1973); and Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978).

In United States ex rel Fisher v. Driber, 546 F.2d 18 (3rd Cir. 1976), the court felt obligated to "follow the mandate of the Jackson[1] court in determining that Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 (1962), requires an evidentiary hearing at the state level to determine the factual complex in which the challenged identification was made." The court in Driber went on to say, at 546 F.2d 21:

1. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 908 (1964)

A similar test was formulated for the Ninth Circuit by Judge (now Chief Judge) Browning in Allison:

> [W]here a timely and sufficient motion is made to suppress identification testimony on the ground that it has been tainted by pretrial photographic identification procedures, it must be heard and determined by the court outside the jury's presence in the same manner as any other motion to suppress evidence alleged to be inadmissible because unlawfully obtained.

414 F.2d at 410. Accord, United States v. Mitchell, 540 F.2d 1163 (3d Cir. 1976). See also United States ex rel. Phipps v. Follette, 428 F.2d 912, 913 n. 1 (2d Cir.), cert.denied, 400 U.S. 908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970); United States v. Cranson, 453 F.2d 123, 125-26 (4th Cir. 1971), cert.denied, 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972); United States v. Sutherland, 428 F.2d 1152, 1155 (5th Cir. 1970), cert.denied, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972); United States v. Broadhead, 413 F.2d 1351, 1359 (7th Cir. 1969), cert.denied, 396 U.S. 1017, 90 S.Ct. 581, 24 L.Ed.2d 508 (1970); Haskins v. United States, 433 F.2d 836, 838-39 (10th Cir. 1970). Cf. United States v. Raneiglio, 429 F.2d 228, 230 (8th Cir.), cert.denied, 400 U.S. 959, 91 S.Ct. 358, 27 L.Ed.2d 268 (1970).

In the case at bar, counsel for Watkins was well aware of the Wade dilemma of "bolstering the courtroom identification by bringing out and dwelling upon his prior identification during cross-examination of the prosecuting witness". See Wade, supra, at 338 U.S. 240, 87 S.Ct. 1939. Indeed, defense counsel objected strenuously to the necessity of using this technique and to the prejudice inherent in it. However, despite his objections, he was forced to delve into the circumstances of the identifications in the presence of the jury.

The evidence in this case reveals various factors which should have been reviewed by the trial court to determine the existence of possible taint. A review of these factors follows.

(1) Neither of the eyewitnesses had much of an opportunity to view the assailant. Walter Smith stated that he only saw the fact of the man when he turned around from getting the cigarettes. The shots were immediately fired and the man ran out (TE 32,33). It happened so quickly that Smith did not even have time to get the money out of the cash register (TE 32). Furthermore, Smith described the man as being about thirty-five years old, and Watkins was only seventeen at the time. Goeing testified that he saw the man's face for about five seconds as he turned around from the soda machine. Shots were then fired, and he passed out (TE 51,51). Both witnesses stated that the assailant was a stranger and they had no reason to pay any particular attention to him (TE 24, 49). He was just another customer until he stated that "this is a hold-up." The interval between the time this statement was made and the time the man ran out of the door was a matter of seconds. Thus, the opportunity for observation was minimal at best.

(2) The three- man line-up was extremely suspect because it involved only one light-skinned black male. This was one of the few physical characteristics which Smith had described to police. The fact that Smith was not sure of his identification at that time, but became sure when he "got himself together," suggests that later in-court appearances with Watkins had the effect of strengthening his previously doubtful identification. The fact that he was not presented with any other possible suspects fitting the description, either by line-up or photograph, may have pressured Smith into identifying Watkins, particularly if he was aware of the fact that Goeing had identified Watkins as the man.

(3) The show-up in the hospital was also suspect. The circumstances suggest that, when Goeing identified Watkins, he expected to see the man who had shot him. Goeing was aware that a man was being brought to his hospital bed in the custody of the police to be identified. He viewed no other suspects but Watkins, a young, light-skinned black male, obviously suspected by the police. The circumstances of the identification were

clearly suggestive and prejudical. Goeing also expressed some doubt at the time of this identification. He said it was close enough that it could have been his twin brother, but it "could have been someone else," (TE 55). This doubt was predictably diminished with each court appearance or proceeding that involved Watkins as the criminal defendant. The district court below provided an excellent overview of exactly the type of prejudice which confronted Watkins when it noted at Appendix 11-12.

> Both Goeing and Smith made in-court identifications of the petitioner during the course of their direct testimony for the prosecution. Both were examined extensively on cross-examination by counsel for petitioner, who brought out the fact that the petitioner was brought to the hospital and there was identified by Goeing as the person who had fired the shots, and that this identification was reinforced in Goeing's mind by having seen petitioner several times while awaiting the call of the case, after the hospital confrontation. Counsel for plaintiff also brought out on cross-examination that Smith was called by the police to come to a line-up two days after the robbery and there was shown three or four black males. He identified the petitioner at the line-up, although he admitted on cross-examination that he was not entirely certain of his identification at that time, but later said that after he got himself together, he knew that petitioner was the man.

The District Court relied heavily on the extensive cross-examination of the prosecution's witesses to reaffirm the lack of suggestiveness of the identification. However, since Watkins' counsel was aware of the problem, there was necessarily an element of restraint involved which precluded a thorough examination. Watkins' counsel felt restricted by the inherent prejudice of blind cross-examination. Thus, he was put in the untenable position of trying to protect Watkins as much as possible from the intrusion of prejudicial, perhaps inadmissible evidence, while at the same time seeking to discover facts about an identification of which he had no prior knowledge. Regardless of the guarded nature of the cross-examination, it unavoidably resulted in the same type of bolstering which Wade condemns and which could have been avoided if a suppression hearing had been held.

In Summitt and Watkins v. Bordenkircher, 608 F.2d 247, 251 (6th Cir. 1979) the Court of Appeals concluded that:

> . . .as applied to identification evidence, Jackson v. Denno, supra and Pinto,[2] supra, only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

Since the defense counsel was forced to explore the reliability of the identification on cross-examination in the presence of the jury, it cannot be found that such a procedure constituted an adequate hearing on the reliability and admissibility of the identification evidence. The utilization of such a procedure places defense counsel in precisely the untenable position envisioned in Wade v. United States, supra. While trying to challenge the reliability of the identification in the presence of the jury, defense counsel runs the inherent risk of causing irreparable prejudice to his client by unavoidably bolstering the courtroom identification through cross-examination. This is an inevitable result of the hearing deemed adequate by the Sixth Circuit in Summitt v. Bordenkircher, supra.

The Third Circuit's decision in United States ex rel. Fisher v. Driber, supra, is in direct conflict with the Sixth Circuit's decision in Summitt v. Bordenkircher, supra. Analogizing the principles enunciated in Jackson v. Denno, supra, to Fisher, the Third Circuit concluded that a state trial court is constitutionally required to conduct a hearing out of the presence of the jury on the reliability and admissibility of identification evidence where the request for such a hearing is not a frivolous one. The case at bar presents a serious question of identification. By denying an in camera hearing

2. Pinto v. Pearce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967).

on the reliability of the identification evidence, the state trial court forced the issue to be resolved in the presence of the jury. Prejudice from such a procedure can be presumed by the maximum sentence imposed on the petitioner.

The Manson court articulated these factors at 97 S.Ct. 2253:

> . . . .the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainity demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

While it is true that this kind of consideration was afforded Watkins in the courts below there is less potential for prejudice to the defendant if these factors are considered in the setting of a suppression hearing. This determination must be made at the trial level to afford the defendant his right to effective counsel, as well as to insure his right to a fair trial.

By contrast in the case at bar, the reviewing courts below have attempted to determine the reliability of the identification retrospectively. Such a retrospective ruling can only hypothesize about questions which might have been asked, but were not because of the presence of the jury. Moreover, such a retrospective determination completely ignores the prejudice to the defendant which results from his being required to test the identification through blind cross-examination at trial. It is virtually impossible at the appellate level to determine what price the defendant has paid for his efforts to expose a suggestive identification. Although it may appear to a reviewing court that there has been "extensive trial cross-examination," the most telling cross-examination questions may not have been asked because of the fear of damaging answers. Consequently, post-conviction findings do not provide a reliable substitute for a suppression hearing at the trial hearing.

In conclusion, the failure of the trial court to grant a prior incamera hearing on the identification by the eye-witnesses prejudiced Watkins in two ways. First, at the trial level, the lack of a hearing resulted in truncated cross-examination of the prosecution witnesses and the bolstering of their in-court identifications by defense counsel. Second, at the appellate level it provided the court with an incomplete record of the proceedings on which to predicate the finding of a lack of prejudice. Under the circumstances presented, nothing short of a contemporaneous hearing could have satisfied Watkins' right to a fair trial consonant with due process of law. Because of the possibility of suggestiveness in the pre-trial confrontations, the denial of a prior incamera hearing on the identification by the eyewitnesses deprived Watkins of a fair trial in accordance with due process of law. In the alternative, the failure to suppress the identification after its unreliability was discovered at trial denied Watkins a fair trial.

II. THIS COURT HAS INDICATED THAT A PROSECUTOR'S CLOSING ARGUMENT CAN DEPRIVE A DEFENDANT OF HIS CONSITUTIONAL RIGHT TO A FAIR TRIAL. IN THE CASE AT BAR THE PROSECUTOR'S REPEATED INJECTION TO EXTRANEOUS MATTERS INTO HIS CLOSING ARGUMENT WAS SO PREJUDICIAL AS TO DENY THE PETITIONER HIS CONSITUTIONAL RIGHT TO A FAIR TIRAL CONSONANT WITH DUE PROCESS OF LAW. THE CASE AT BAR REFLECTS THE NECESSITY FOR THIS COURT TO PROMULGATE STRICT GUIDELINES IN ORDER TO CURB ABUSES IN THE CLOSING ARGUMENT WHICH DENY CRIMINAL DEFENDANT A FAIR TRIAL.

In the case at bar, the prosecutor repeatedly encouraged the jury to rely on extraneous matters in its deliberations, with the apparent sanction of the court. Furthermore, the

argument of the prosecutor was so blatant an appeal to passion and prejudice as to deprive Watkins of his constitutional right to a fair trial consistent with due process of law.

In his summation, the prosecutor delivered a tempestuous commentary on the sociological and psychological framework of criminals in general. His comments attempted to convince the jurors that they would be doing their duty as citizens of this community to return a conviction. The prosecutor made the following remarks over objection (TE 174-175):

> MR. ZOLLINGER: ...I don't like to see anybody go to the penitentiary. The reason I don't like to see that is because they have to be there with people exactly like themselves. When they go to the penitentiary they are going to be in the same enclosure with people like themselves who have no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that away from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in. He doesn't belong in the community where people go to work every day.
>
> MR SOUTHARD: Your Honor, I'm going to object. I think this argument is out of the context of the evidence.
>
> THE COURT: Overrule the objection.
>
> MR. SOUTHARD: Thank You.
>
> MR ZOLLINGER: He belongs in a community of people like himself, not out here where he's confrontating people who work for a living, that don't go around patking guns, that aren't going into places where other people are working and pointing a gun at them and confronting them with death. That's strictly the conditions.

> The only way that we can have any effect on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so that you tell everybody in connection with the prisons and the authorities, from the Governor on down, that we don't want this man or men like him in our community. We want him out of here. And the only way you can get that message across is by fixing the sentences as long as you possible can fix them. Fix those sentences so long that this man will be off the streets as long as we possible can keep him off the streets. (Emphasis added)

Defense counsel renewed his objection and was overruled (TE 176). The prosecutor then proceeded to ask the jurors (TE 176):

> MR ZOLLINGER: And the kind of community that you will live in, that your children will live in, and your grandchildren will live in...I don't think you would prefer to have a community with people like this in it. This is your chance to get them out of here. This is your chance. (Emphasis added)

In conclusion, the prosecutor enforced his earlier comments by repeating (TE 178):

> MR. ZOLLINGER"...don't think this is being harsh. This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or have any respect for other people. The only way you can get them to behave is to get tough with them. (Emphasis added)

In addition to these comments, the prosecutor misstated the evidence (TE 169):

> MR ZOLLINGER: ...You know what the alibi witnesses said...One man said there was a girl with them and the other one said there wasn't.

According to the record, both witnesses unequivocally testified there was no girl involved (TE 107.113).

The remarks by the prosecutor inferred that, by returning a verdict of guilty, the jurors would be doing their duty as parents, grandparents and hard-working citizens, ridding the community of dangerous criminals. The prosecutor asked the jury to contribute to the "cleaning up" of society by isolating in the penitentiary all those who have "no respect for the lives and rights of others." He sought a maximum sentence against Watkins to serve as an example to other criminals and to "the Governor on down," that "we don't want this man or men like him in our community." (TE 175). The effect of this argument was to give the jury additional issues to take into the jury room other than those raised by the evidence.

The Sixth Amendment to the United States Constitution guarantees every defendant a trial by an impartial jury and the right to be confronted by the witnesses against him. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). These

rights are guaranteed to state defendants as a matter of due process of law under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The guarantee of a fair trial is implicit in the concept of due process of law. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

The effect of the constitutional guarantee enunciated in the aforementioned cases has been aptly summarized by the Supreme Court in the case of In re Murchinson, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) when it said:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of acutal bias in the trial of cases. But our system of law has always endeavored to prevent its function in the best way "justice must satisfy the appearance of justice." Id. at 349 U.S. 136, 755 S.Ct. 625, 99 L.Ed. 946 (citations omitted).

In Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the court intimated that a statement by a prosecutor outside the record could very well in and of itself constitute a denial of due process of law and violate a defendant's right of confrontation, and such aggravated misconduct by a prosecutor in his closing argument may amount to a denial of a defendant's fundamental right to a fair trial. Id. at Fn. 23, 416 U.S. 648-49, 94 S.Ct. 1873, 40 L.Ed.2d 431.

The standard for review with regard to allegations of due process violations in habeas corpus proceedings was set out in Donnelly at 416 U.S. 642, 94 S.Ct. 1871, 40 L.Ed.2d 431:

> The Court of Appeals in this case noted, as petitioner urged, that its review was "the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." We regard this observation as important for not every trial error or infirmity which might call for application of supervisory power correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941).

Naturally, it is impossible to recreate, on the written page, the full impact and emotion of the prosecutor's argument. Nonetheless, the cumulative effect of the prosecutor's misconduct denied Watkins a constitutionally fair trial and consequently deprived him of due process of law.

The prosecutor's comments and conduct during closing argument were neither isolated nor ambiguous, as were the statements in Donnelly v. DeChristoforo, supra. Rather, they were intentionally designed to inflame the jury by bringing before it matters outside the record. The prosecutor deliberately strived to deflect the jury's attention from matter legitimately before it.

In Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), it was held that improper argument by the prosecutor could preclude a defendant from receiving a fair trial and thereby violate due process:

> It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be truthfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they rproperly carry none. Id. at 295 U.S. 88, 55 S.Ct. 633, 79 L.Ed. 1321.

The unique role of the prosecutor as representing the state inherently lends substantial credence to his words and actions. Consequently, when the prosecutor during closing argument embarks on a course of conduct designed to create prejudice against a defendant, he renders the concept of fair trial to be nothing more than fiction. See Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943).

Several federal courts have recognized the growing constitutional problem of inflammatory summations by prosecutors. In Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974), the court

stated that inflammatory comments require an evidentiary hearing on the issue in accordance with the fair trial standard set forth in Donnelly v. DeChristoforo, supra. Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) discusses the problem created when the prosecutor makes personal speculations or impassioned pleas for safe streets:

> We are mindful of the fact that federal courts do not sit as courts of errors and appeals when a state prisoner seeks federal habeas corpus. At the same time, we cannot ignore our responsibility to insure that an accused obtain a fair trial by an impartial jury. As the Supreme Court has reinterated time and again, "[e]xercise of calm and informed judgment by...[a jury's] members is essential to proper enforcement of law." Highly prejudicial remarks uttered by the prosecutor jeopardize the jury's deliberative process and hence infringe upon an accused's right to a fair hearing on the merits of the case. Id at 483 F.2d 1040, [Footnotes omitted].

In United States v. Barker, 553 F.2d 1013 (6th Cir. 1977), the court, citing Berger, supra, noted that while the prosecutor is allowed some latitude in summation, it is beyond the bounds of propriety for him to suggest that unless a particular defendant is convicted, maintenance of law and order in the community would be impossible. In that case, the prosecutor said at 1025:

> Mr. Barker's attorney admits that these defendants are not desirable people, that they're undesirable people. now, I submit to you that desirable people don't rob banks; undesirable people do rob banks, and they admit that they're undesirable. Because they're undesirable doesn't mean they robbed this bank, but you should consider that also along with all this other evidence.
>
> I submit to you that if you can't take this evidence and find these defendants guilty on this evidence that we might as well open all the banks and say, "Come on and get the money, boys, because we'll never be able to convict them."

The court found that, on the basis of these remarks, the prosecutor failed to comply with the obligation set out by the Supreme Court in Berger, supra.

Similarly, in Malley v. State of Connecticut, 414 F.Supp. 1115 (D.Conn 1976), the court held that a prosecutor who had made numerous remarks associating the defendant with an unpopular or feared group, and who told the jurors that by convicting the defendant they could in effect stamp out the drug problem, deprived the defendant of a fair trial consonant with due process of law.

In the case at bar, the prosecutor was allowed, over objection, to make damaging comparisons and personal comments about matters outside the record which were not subject to cross-examination by the defense. By so doing, the prosecutor deprived Watkins of his right of confrontation and his right to a fair and impartial trial consonant with due process of law. Specifically, this was accomplished by (1) commenting on extraneous matters not properly before the court which were not subject to cross-examination, rebuttal or any form of retaliation, (2) suggesting that the conviction of Watkins will help clean up society of an undesirable criminal element, (3) suggesting that the jury has a duty to "send a message" on behalf of the citizens of Jefferson County to the "Governor on down" that people like Watkins are not wanted in this community, (4) suggesting that the jury has a duty to the community and their families to make an example of Watkins for the protection of society in general, and (5) attacking the case for the defense by misstating the evidence on the record.

In its opinion, the district court held that Watkins did not meet the burden of showing that the remarks of the prosecutor so infected the trial with unfairness as to make the resulting conviction a denial of due process. However, the court did note that at Appendix 17.

> In evaluating the remarks of a prosecutor, the question of whether or not his conduct so infects the trial with unfairness as to make the resulting conviction the denial of due process is not always easy of resolution. This is the case here, since the prosecutor did make several rather emotional remarks about the alleged duties of the jury to cleanse the community of the criminal element who "go around packing guns".

The Sixth Circuit also noted the impropriety of prosecutor's closing argument. Summitt and Watkins v. Bordenkircher, supra 608 F.2d at 253.

In Malley, supra, the court said at 1120:

> While it is impossible to establish with certainty whether, but for the misconduct of the prosecutor, the jury would have returned a different verdict, it is possible to state that, on its merits, the case against the petitioner was a close one. The State's case consisted solely, of the testimony
>
> of the two officers, and they disagreed on the critical issue of the time of the alleged sale and were contradicted by their own report on their identification of the petitioner's automobile license number. On the other hand, the petitioner was able to marshal impressive evidence on his own behalf.

Likewise in the case at bar, the Commonwealth rested its case on the questionable identification testimony of two prosecuting witnesses, while the defense introduced evidence to substantiate both the fact that Watkins was elsewhere at the time of the robbery, and eyewitness testimony to the effect that Watkins was not one of the individuals involved. The fact that the jury returned a maximum sentence on all counts illustrates the impact of these comments. The prejudicial and inflammatory nature of the closing argument by the prosecutor deprived Watkins of substantial constitutional rights. Therefore, he must be granted relief from the ensuing conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, that this Court should issue a writ of certiorari, and review the rulings of the courts below.

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IN THE SUPREME COURT

OF THE UNITED STATES

JOHN GREGORY WATKINS,
Petitioner

V. NO._____

DONALD E. BORDENKIRCHER, WARDEN,
Respondent

INDEX TO THE APPENDIX

Item	Page
Opinion of the United States Court of Appeals for the Sixth Circuit rendered on October 19, 1979	1-8
Judgment entered by the United States Court of Appeals for the Sixth Circuit on October 19, 1979	9
Docket Entries in the United States District Court for the Western District of Kentucky	10
Memorandum Opinion of the United States District Court for the Western District of Kentucky rendered on September 28, 1978	11-17
Order entered by the United States District Court for the Western District of Kentucky on September 2, 1978	18
Opinion of the Supreme Court of Kentucky rendered on May 2, 1978	19-20
Judgment No. 153965 entered in Jefferson Circuit Court on July 15, 1977	21
Judgment No. 158242 entered in Jefferson Circuit Court on July 15, 1977	22

James Willard SUMMITT,
Petitioner-Appellant,

v.

Donald E. BORDENKIRCHER, Warden,
Kentucky State Penitentiary,
Respondent-Appellee.

John Gregory WATKINS,
Petitioner-Appellant,

v.

Donald E. BORDENKIRCHER, Warden,
Kentucky State Penitentiary,
Respondent-Appellee.

Nos. 78-3415, 78-3587.

United States Court of Appeals,
Sixth Circuit.

Argued June 5, 1979.

Decided Oct. 19, 1979.

On appeals from orders of the United States District Court for the Western District of Kentucky, Thomas A. Ballantine, Jr., J., and Charles M. Allen, J. denying state prisoners' petitions for writ of habeas corpus, the Court of Appeals, Bailey Brown, Chief Judge, held that it is not a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence, even though a hearing outside the jury's presence is preferable.

Affirmed.

Merritt, Circuit Judge, filed a dissenting opinion.

1. Constitutional Law ⇐266(3.5)

It is not a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence, even though a hearing outside the jury's presence is preferable. U.S.C.A.Const. Amends. 5, 14.

2. Constitutional Law ⇐266(3.2)
Criminal Law ⇐641.2

A defendant is entitled to have counsel present at any corporeal identifications which occur after the initiation of criminal proceedings, but even where the right to counsel is not applicable, due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. U.S. C.A.Const. Amends. 5, 14.

3. Criminal Law ⇐339.9(1)

Whereas the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

4. Criminal Law ⇐339.9(2)

Among the factors relevant to the reliability of identification evidence are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated by him at the confrontation, and the length of time between the crime and the confrontation.

5. Criminal Law ⇐339.7(1)

Under some circumstances, the use of a photographic display may enhance the possibility of misidentification, but each case must be considered on its own facts.

6. Criminal Law ⇐339.7(1)

In respect to the pretrial photographic identification of rape defendant, there was no substantial likelihood of misidentification by reason of the introduction at trial of the victim's pretrial identification, since the pretrial identification could not be characterized as either suggestive or unreliable; the victim had ample opportunity to study her assailant, she provided the police with a detailed and accurate description, and soon after the attack she identified defendant from among a multitude of police photographs that were presented in a neutral fashion.

7. Criminal Law ⇐339.8(2)

A showup is inherently suggestive.

8. Criminal Law ⇐339.8(1)

When only one person is presented to a witness, there is a natural tendency for the witness to feel obligated to provide a positive identification, but in some cases a showup becomes a necessary identification procedure.

9. Criminal Law ⇐339.8(5)

Identification of defendant by robbery victim at showup was not so unreliable as to create a substantial likelihood of misidentification, where the showup, rendered necessary by the seriousness of hospitalized robbery victim's wounds, was conducted in a manner that did not take advantage or augment its inherent suggestiveness, where the victim had had a clear, albeit brief, opportunity to view the person robbing the liquor store, and where the identification at the showup reflected an element of uncertainty, but that element was very small.

10. Criminal Law ⇐339.8(2)

Unlike a showup, a lineup need not be and should not be unduly suggestive.

11. Criminal Law ⇐339.8(2)

Unnecessary suggestiveness in a lineup does not, by itself, require the exclusion of the identification as long as it contains sufficient indicia of reliability.

12. Criminal Law ⇐339.8(4)

Based on the totality of the circumstances, lineup identification of defendant by liquor store robbery victim was sufficiently reliable that there was no substantial likelihood of misidentification, even though the lineup was suggestive in that defendant was of a somewhat lighter complexion than the other two persons in the lineup.

13. Constitutional Law ⇐266(3.2)

A defendant is denied due process only when the identification evidence is so unreliable that its introduction renders the trial unfair. U.S.C.A.Const. Amends. 5, 14.

14. Criminal Law ⇐741(2)

As long as there is not a substantial likelihood of misidentification, it is the function of the jury to determine the ultimate weight to be given identification evidence.

15. Constitutional Law ⇐268(8)

While several of the prosecutor's closing remarks, concerning defendant's character and the threat to the community, were improper, they were not so pervasive nor so prejudicial as to deny defendant due process. U.S.C.A.Const. Amends. 5, 14.

16. Criminal Law ⇐713

Point at which improper argument amounts to a constitutional deprivation can only be defined by reference to the totality of the circumstances of the particular case.

Terrence R. Fitzgerald, Chief App. Defender, Louisville, Ky. (Court-appointed), for petitioner-appellant.

John Gregory Watkins, pro se.

Robert F. Stephens, Atty. Gen. of Kentucky, Victor Fox, Asst. Atty. Gen., Frankfort, Ky., for respondent-appellee.

Before LIVELY and MERRITT, Circuit Judges, and BROWN,* District Judge.

BAILEY BROWN, Chief District Judge.

[1] These two appeals were consolidated for the purpose of considering whether it is a denial of due process for a state court in a criminal trial to decline to conduct a hearing outside the presence of the jury to determine the admissibility of identification evidence. We conclude that such a hearing is not constitutionally required and that the introduction of identification evidence in these cases did not violate due process standards. Accordingly, we affirm the decisions of the district courts.

The petitioner, James Willard Summitt, was indicted for rape on September 19, 1974. The rape occurred in Jefferson Coun-

* Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

ty, Kentucky late in the evening of July 20, 1974 when two men forced the victim, Donna Jean Furgason, into their car. The incident took place over a period of approximately forty-five minutes.

On July 21, 1974, Ms. Furgason reported the rape to the police. She described her assailant as a white male in his thirties, approximately five feet nine inches, 180 pounds, with tattoos on both arms. She looked through approximately twelve volumes of photographs at the county police headquarters in an attempt to identify the person who had raped her. Two days later, she was taken to the city police headquarters to review additional volumes of photographs. At that time, she identified a photograph of James Willard Summitt.

Prior to trial, Summitt moved to suppress any in-court identification by Ms. Furgason and requested a hearing out of the presence of the jury to determine the admissibility of the identification evidence. That motion and request were denied.

At trial, both the pretrial photographic identification and an in-court identification were introduced. At the conclusion of the evidence, the jury returned a verdict of guilty and recommended life imprisonment. On appeal to the Kentucky Supreme Court, the conviction was affirmed.

The petitioner, John Gregory Watkins, was indicted in March, 1975 for armed robbery and assault. The robbery took place at a liquor store in Louisville, Kentucky. During the course of the robbery, an employee in the store was shot in the wrist and in the heart.

Donald Goeing, the employee who was shot, described the robber as a young, black man with a light complexion. Walter Smith, the other employee in the store, described the robber as a black man with a light complexion, thirty to thirty-five years old, and approximately five feet, nine inches tall.

Two days after the robbery, Walter Smith viewed a lineup consisting of three black men, one of whom was the petitioner Watkins. Watkins had a lighter complexion than either of the other two men in the lineup, though none of them had a particularly dark complexion. Smith identified Watkins but admitted that he was not "completely sure" that Watkins was the person who robbed the store.

On the same day, Watkins was taken to the hospital room where Donald Goeing was recovering from his wounds. Goeing identified Watkins, but at the same time he stated that "it could have been close enough that it could have been his twin brother, it could have been somebody else."

Prior to his trial, Watkins filed a motion seeking a pre-trial hearing on the admissibility of the identification evidence. The trial judge denied the motion.

At the trial, the prosecution relied on the in-court identifications of Watkins by both Smith and Goeing. On cross-examination, the circumstances surrounding both the lineup and the showup were brought out. Moreover, both Smith and Goeing admitted having seen Watkins in the courtroom on several occasions prior to trial. At the conclusion of the prosecutor's proof, the trial court denied Watkins' motion for a mistrial based on the introduction of the identification evidence. The jury returned a verdict of guilty and recommended the maximum sentence. On appeal to the Kentucky Supreme Court, the conviction was affirmed.

[2] In both of these cases, the central dispute at trial was over the identification of the person who committed the crime. In every criminal trial, there exists some danger of misidentification. That inherent danger, however, is significantly increased whenever the identification is tainted by unnecessary and unduly suggestive procedures. To deter the use of suggestive identification procedures, the Supreme Court has held that a defendant is entitled to have counsel present at any corporeal identifications which occur after the initiation of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). *See also Moore v. Illinois*, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977);

United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Even where the right to counsel is not applicable, however, "due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois, supra*, 434 U.S. at 227, 98 S.Ct. at 464. It is this latter due process protection which the petitioners claim was violated in their state trials.

The initial issue presented by these appeals is whether the admissibility of identification evidence must be determined at a hearing outside the presence of a jury. We have no doubt that such a procedure is the preferable one. See *Nassar v. Vinzant*, 519 F.2d 798 (1st Cir.), *cert. denied*, 423 U.S. 898, 96 S.Ct. 202, 46 L.Ed.2d 132 (1975). *See also United States v. Poe*, 462 F.2d 195 (5th Cir. 1972), *cert. denied*, 414 U.S. 845, 94 S.Ct. 107, 38 L.Ed.2d 83 (1973); *United States v. Cranson*, 453 F.2d 123 (4th Cir. 1971), *cert. denied*, 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972); *United States v. Allison*, 414 F.2d 407 (9th Cir.), *cert. denied*, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969); *Clemons v. United States*, 133 U.S.App.D.C. 27, 408 F.2d 1230 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 964, 89 S.Ct. 1318, 22 L.Ed.2d 567 (1969). An independent hearing on the admissibility of identification evidence, either before trial or at trial outside the presence of the jury, would remove the disadvantage to defendant's counsel of investigating the propriety of the identification evidence in the presence of the jury. In addition, it would protect the jury from being exposed to evidence that might subsequently be determined inadmissible. Kentucky state courts have apparently since endorsed this procedure. *See Brown v. Kentucky*, 564 S.W.2d 24 (Ct.App.1978). The issue in this case, however, is not whether a hearing outside the presence of the jury is the preferable procedure but whether such a procedure is constitutionally mandated.

In *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the Supreme Court held that a defendant's due process rights were violated by a procedure which allowed the same jury that determined the guilt or innocence of a defendant to determine simultaneously the issue of the voluntariness of the defendant's confession. The fundamental premise of *Jackson* was that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, *without regard for the truth or falsity of the confession*." *Jackson v. Denno, supra* at 376, 84 S.Ct. at 1780. (Emphasis added.) A jury that is considering the guilt or innocence of a defendant is likely to allow the truthfulness of a confession to influence its determination of the voluntariness of the confession. To avoid this danger, *Jackson* established the procedural requirement that, prior to the admission of a confession, the trial judge must make an independent determination of its voluntariness after an adequate hearing on the issue. "[T]he purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts." *Lego v. Twomey*, 404 U.S. 477, 486, 92 S.Ct. 619, 625, 30 L.Ed.2d 618 (1972). Its purpose is to protect the due process right against the introduction of involuntary confessions, regardless of their reliability.

[3] The basis of the due process right against suggestive identification procedures is significantly different.

It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377 at 384 [88 S.Ct. 967, 19 L.Ed.2d 1247]. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a de-

fendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Neil v. Biggers, 409 U.S. 188 at 198, 93 S.Ct. 375 at 381–382, 34 L.Ed.2d 401 (1972). Thus, whereas the admissibility of confessions is determined without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability.

We construe *Pinto v. Pierce*, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967), as holding that due process does not require that the hearing upon which the trial judge makes his independent determination of voluntariness, as is required by *Jackson v. Denno, supra*, be held outside the presence of the jury.[1] The Supreme Court has never ruled on the precise question presented here. We conclude, however, that, by analogy to the ruling in *Pinto*, due process does not require a hearing outside the presence of the jury on the issue of the reliability of identification evidence. We recognize, as is pointed out in the dissent citing language in *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), that trial counsel for defendant does bear an extra burden in exploring the reliability of identification evidence in the presence of the jury. However, we note that the issue before us now was not the issue before the Court in *Wade*, and, further, *Pinto* was decided shortly after *Wade*. Moreover, it appears to us that the burden of exploring the voluntariness issue before the jury would be at least as great as the burden of exploring the reliability of identification evidence before the jury.

The decision of the Third Circuit in *United States v. Driber*, 546 F.2d 18 (1976), relied upon by the dissent, does hold that due process requires that the court hold the hearing to determine the admissibility of identification evidence out of the presence of the jury if the request for such a hearing is "not frivolous." (*Driber*, at 22). We note, however, that in many cases it would be difficult, if not impossible, to determine whether the request was frivolous without holding the hearing. Moreover, *Driber* relies on federal precedents which may well be examples of the exercise of supervisory powers rather than rulings on the requirements of due process.

We conclude, then, that as applied to identification evidence, *Jackson v. Denno, supra*, and *Pinto, supra*, only require that the trial court make an independent determination of the reliability of the identification after an adequate hearing. In each of these cases, the state trial court had before it all of the facts concerning the reliability of the identification evidence. The trial court reached the conclusion, based upon these facts, that the evidence was admissible. Since both petitioners received an adequate hearing and an independent determination of the reliability of the identification evidence, we cannot conclude that the procedure for determining the admissibility of the identification evidence violated due process.

[4] Having determined the initial procedural issue, we turn next to the substantive issue of whether the introduction of identification evidence in these cases violated due process standards. As we have previously indicated, reliability is the key factor in determining the admissibility of identification evidence. Among the factors relevant to reliability are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers, supra*, 409 U.S. at 199, 93 S.Ct. at 382. These factors must be weighed against the effect of the suggestive procedure to determine whether the identifica-

1. We also recognize that the decision is placed on the alternative ground that trial counsel of defendant did not object to holding such hearing in the presence of the jury.

tion is so unreliable as to create a substantial likelihood of misidentification. *See Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

[5, 6] The identification evidence introduced at the trial of the petitioner, James Willard Summitt, consisted of both an in-court identification and a pretrial photographic identification. Under some circumstances, the use of a photographic display may enhance the possibility of misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). But each case must be considered on its own facts. *United States v. Ayendes*, 541 F.2d 601 (6th Cir. 1976), *cert. denied*, 429 U.S. 1063, 97 S.Ct. 789, 50 L.Ed.2d 779 (1977). The pretrial photographic identification in this case cannot be characterized as either suggestive or unreliable. Ms. Furgason had ample opportunity to study her assailant. She provided the police with a detailed and accurate description. Soon after the attack, she identified Summit from among a multitude of police photographs that were presented in a neutral fashion. Under these circumstances, we cannot find that there was a substantial likelihood of misidentification. Since we find that introduction of the pretrial identification was not improper, we need not consider whether the in-court identification had an independent basis.

[7-9] At the trial of the petitioner, John Gregory Watkins, the prosecution introduced in-court identifications by the two witnesses to the robbery, Walter Smith and Donald Goeing. These identifications were based on a pretrial lineup and a pretrial showup. Since we believe that there was no independent source for the in-court identifications, the validity of their admissibility is dependent on the validity of the pretrial identification procedures.

A showup is inherently suggestive. When only one person is presented to a witness, there is a natural tendency for the witness to feel obligated to provide a positive identification. But in some cases, a showup becomes a necessary identification procedure. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Given the seriousness of the wounds to Donald Goeing, a showup was necessary in this case. That showup was conducted in a manner that did not take advantage or augment its inherent suggestiveness. Goeing had had a clear, albeit brief, opportunity to view the person robbing the liquor store.[2] At the showup, Goeing's identification of Watkins reflected an element of uncertainty, but that element was very small. Based on the totality of the circumstances, we cannot conclude that the identification at the showup was so unreliable as to create a substantial likelihood of misidentification.

[10, 11] Unlike a showup, a lineup need not be and should not be unduly suggestive. The lineup in this case, however, to some degree employed the key element of the witness' description, lightness of complexion, to set Watkins apart from the other two persons in the lineup. Watkins, according to the picture of the lineup, was of a somewhat lighter complexion than the other two persons in the lineup. Such an identification procedure probably could have been avoided. But, even so, unnecessary suggestiveness by itself does not require the exclusion of the identification as long as it contains sufficient indicia of reliability. *Neil v. Biggers, supra*, 409 U.S. at 198, 93 S.Ct. 375.

In addition to the suggestiveness of the lineup, there are several facts which indicate possible unreliability. Walter Smith admitted that at the time of the lineup he "wasn't completely sure" that Watkins was the robber. Moreover, Smith originally described the age of the robber as approximately thirty to thirty-five, whereas Watkins was significantly younger. These facts must be weighed against the facts which

2. The liquor store was well-lit. Goeing was in the process of filling a cooler with soft drinks. When he heard the words, "This is a holdup," he turned and looked at the robber. Goeing's movements evidently caused the robber to shoot him. Goeing lost consciousness about five seconds later as the robber fled from the store.

reflect reliability. Smith had a good opportunity to look at the person robbing the store.[3] While his identification at the lineup contained a degree of uncertainty perhaps greater than Goeing's identification at the showup, the degree of uncertainty was not substantial. That initial uncertainty did not continue. Moreover, Smith was not exposed to any additional suggestive procedures. *See Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).

[12] The admissibility of the lineup identification presents a very close question. But based on the totality of the circumstances we believe that it was sufficiently reliable that there was no substantial likelihood of misidentification.

[13, 14] The issue with respect to each one of the identifications in these cases is limited to whether their introduction into evidence violated due process. A defendant is denied due process only when the identification evidence is so unreliable that its introduction renders a trial unfair. As long as there is not a substantial likelihood of misidentification, it is the function of the jury to determine the ultimate weight to be given the identification. *Manson v. Brathwaite, supra*. Given the limited focus of our inquiry, we hold that the introduction of identification evidence in these trials did not violate due process.

[15, 16] Finally, we consider the petitioner Watkins' claim that the prosecutor's closing argument deprived him of a fair trial. There is little doubt that several of the prosecutor's remarks were improper.[4] But impropriety alone is not sufficient. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "The prosecutorial argument must be so egregious so as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir. 1979). That point at which improper argument amounts to a constitutional deprivation can only be defined by reference to the totality of the circumstances of the particular case. In this case, we are convinced that the prosecutor's remarks were not so pervasive nor so prejudicial as to deny the petitioner due process.

Each of the issues raised in these appeals involve alleged violations of due process. Our scope of review, therefore, is limited to whether the conduct complained of was contrary to basic notions of fairness. Applying this narrow standard of fairness, we conclude that the judgments of the district courts must be and are

AFFIRMED.

MERRITT, Circuit Judge, dissenting.

In each of these habeas corpus cases from Kentucky, there is a serious question concerning the reliability of the courtroom

3. Smith was standing at the cash register when three men walked in. One man approached him and asked him for cigarettes. When Smith turned back around, the man had pulled a gun and stated, "This is a holdup." Thus, Smith was face-to-face with the robber for the brief time that the robbery was in progress.

4. In his closing argument, the prosecutor stated:

> ". . . When they go to the penitentiary they are going to be in the same enclosure with people like themselves who have no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that away from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in
>
> . . . . . .
>
> The only way that we can have any effect on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so long that you tell everybody in connection with the prisons and the authorities, from the Governor on down, that we don't want this man or men like him in our community.
>
> . . . . This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or have any respect for other people. The only way you can get them to behave is to get tough with them."

We have considered similar remarks concerning the defendant's character and the threat to the community to be beyond the bounds of propriety. *United States v. Barker*, 553 F.2d 1013 (6th Cir. 1977).

identification of the defendant as the perpetrator of the crime. In both, the identification testimony constitutes the only substantial evidence linking the defendant with the crime. In both, the state trial judge denied the request of defense counsel for a hearing on the question out of the presence of the jury. In such circumstances, I would follow Judge Aldisert's opinion for the Third Circuit in *United States v. Driber*, 546 F.2d 18 (1976), holding that due process requires a hearing out of the presence of the jury where serious identification questions are present. Otherwise, defense counsel is paralyzed in his efforts to defend his client. He is in the untenable position, as the Supreme Court noted in *United States v. Wade*, 388 U.S. 218, 241, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967), of trying by cross-examination of the identification witness "to discover and reveal unfairness, while bolstering the . . . courtroom identification by bringing out and dwelling upon his prior identification."

In re ESTATE of B. Joseph RATH, Deceased.

The DETROIT BANK AND TRUST COMPANY, Executor, and Catherine Rath, Surviving Wife, Plaintiffs-Appellees,

v.

UNITED STATES of America, Defendant-Appellant.

No. 77-1403.

United States Court of Appeals, Sixth Circuit.

Argued June 8, 1979.

Decided Oct. 19, 1979.

Beneficiary of life policy brought action to recover income taxes. The United States District Court for the Eastern District of Michigan, Philip Pratt, J., entered judgment in favor of taxpayer and government appealed. The Court of Appeals, Cecil, Senior Circuit Judge, held that, under the circumstances, the proceeds of the policy were ordinary income to the beneficiary to the extent that they exceeded the amount which she had paid to a corporation to purchase policy from it, together with the premiums which she had paid.

Reversed and remanded.

1. Internal Revenue ⇐410.1

In the absence of any action on the part of deceased insured whereby there was a transfer of insurance policy from the corporation to himself, under the terms of an option which he held, and a subsequent transfer from himself to his wife, even though the husband may have given the wife the money with which she made the purchase from the corporation, where the policy was transferred from the corporation to the insured, the amounts received under the policy following the insured's death were ordinary income to the wife to the extent that they exceeded the amount which she paid for the policy in the amount of premiums which she subsequently paid. 26 U.S.C.A. (I.R.C.1954) § 101.

2. Internal Revenue ⇐410.1

Fact that corporation placed a value of $11,600 on life policy at the time that it was conveyed to insured's wife, whereas the value of the policy for gift or estate tax purposes was $17,500, did not show that the transfer of the policy from the corporation to the wife was in part a sale by the corporation and in part a gift by the insured, who had directed that the policy be assigned to his wife. 26 U.S.C.A. (I.R.C.1954) § 101.

3. Internal Revenue ⇐410.1, 1202

Although private ruling and revenue ruling supported the view that deceased insured possessed incident of ownership in policy for estate tax purposes because of his right to purchase the policy from the corpo-

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

OCT 19 1979

JOHN P. HEHMAN, Clerk

No. 78-3587

JOHN GREGORY WATKINS,

Petitioner-Appellant,

v.

DONALD BORDENKIRCHER, WARDEN, KENTUCKY STATE PENITENTIARY,

Respondent-Appellee.

Before: LIVELY and MERRITT, Circuit Judges, and BROWN, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

Issued as Mandate: November 19, 1979

COSTS: None

Filing fee.....$ .....
Printing $ .....

Total $ .....

A True Copy.

Attest:

Deputy Clerk

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT

C78-0241 L(A) WATKINS V. BORDENKIRCHER

DATE	NR.	PROCEEDINGS
6/28/67		Petition received and forwarded to Magistrate
6/29/78	1.	Order by Mag. Booth that Motion to proceed IFP granted, petition ordered fi Resp. shall file answer w/in 20 days. Notice
6/29/78	2.	Petition filed.
7/19/78	3.	Return to Show Cause Order, Response, Motion to Dismiss and in alternative m for s/j by respondent w/memo in support & exhibits. Order tend.
7/21/78	4.	TRAVERSE to response: RESPONSE to motion to dismiss and Motion for summary
8/7/78	5.	ORDER by Judge Allen that respondent file transcript of evidence No. SC-554- of Supreme Court of Ky. w/in 15 days from date of order. Notice.
8/ 78	6.	CERTIFIED COPY OF TRANSCRIPT OF EVIDENCE AND TRANSCRIPT OF RECORD by respondent by order of Court.
8/29/78	7.	MEMORANDUM OPINION by Judge Allen re:motion to dismiss or, in alternative, S NOTICE.to counsel.
8/29/78	8.	SUMMARY JUDGMENT by Judge Allen that motion of respondent sustained and comp dismissed w/prejudice. Final and appealable. Notice.
10/6/78	9.	NOTICE OF APPEAL filed by petitioner.
10/6/78	10.	REQUEST for Certificate of Probable Cause filed; Order tend.
10/23/78	11.	CERTIFICATE OF PROBABLE CAUSE by Judge Allen.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

JOHN GREGORY WATKINS, Petitioner,	)	
v.	)	CIVIL ACTION
DONALD BORDENKIRCHER, Warden Kentucky State Penitentiary, Respondent.	)	No. C 78-0241 L(A)

MEMORANDUM OPINION

This action is under submission on the motion of the respondent to dismiss or, in the alternative, for summary judgment. In considering the motion, the Court has had the benefit of the entire trial record in the Jefferson Circuit Court, as well as the decision of the Supreme Court of Kentucky, affirming petitioner's conviction on May 2, 1978, Watkins v. Commonwealth, Kentucky, ____ S.W.2d ____

The first issue raised by the petitioner relates to the questio of the methods of identification used by the prosecution. Petitione was charged with the attempted armed robbery of the Thoroughbred Liquor Store in Louisville, Kentucky, on January 11, 1975. The robbery occurred at about 11:30 p.m., when four men came to the store and one of them asked an employee of the store, Walter Smith, for a pack of cigarettes. When Smith turned to get the cigarettes, one of the men said "this is a hold-up". Following this announcement, Donald L. Goeing, a part-owner of the store, who was stocking a soft drink cooler, turned around and immediately thereafter two shots were fired by a person whom Goeing described as the petitioner, one of which hit Mr. Goeing's heart and the other his wrist and arm. Immediately thereafter the man who fired the shots ran out the door.

Both Goeing and Smith made in-court identifications of the petitioner during the course of their direct testimony for the

prosecution. Both were examined extensively on cross-examination by counsel for petitioner, who brought out the fact that the petitioner was brought to the hospital and there was identified b Goeing as the person who had fired the shots, and that this iden- tification was reinforced in Goeing's mind by having seen petitio several times while awaiting the call of the case, after the hospital confrontation. Counsel for plaintiff also brought out on cross-examination that Smith was called by the police to come to a line-up two days after the robbery and there was shown three or four black males. He identified the petitioner at the line-up, although he admitted on cross-examination that he was not entirely certain of his identification at that time, but later said that af he got himself together, he knew that petitioner was the man. Lik Goeing, he had also seen petitioner several times after the line-u on the occasion of various court appearances.

Petitioner contends that the failure of the trial court to gr petitioner's motion for an in-camera hearing on the identification question deprived petitioner of a fair trial, in accordance with du process of law. Petitioner further contends that the failure to suppress the identification, after its unreliability was discovered at trial, denied Watkins a fair trial.

Petitioner has not cited, nor have we found, any cases which hold that there is a constitutional requirement that a suppression hearing be held prior to trial, and out of the presence of the jury on the question of identification. In Ray v. Commonwealth, Kentuck 550 S.W.2d 482, 483 (1977) and Watkins v. Commonwealth, Kentucky, supra, (1978), the Supreme Court of Kentucky has held that, although pretrial suppression hearings are preferable, the failure to hold them does not require the reversal of a conviction. We are, likewis convinced that, although pretrial identification hearings are much to be preferred over the method of presenting the entire identifica-

tion case to the jury without a pretrial hearing, the due process rights of the petitioner have not been violated, inasmuch as he had and exercised the opportunity to cross-examine thoroughly the witnesses on identification.

As to the second prong of petitioner's argument with respect to identification, the Court is convinced that Stovall v. Denno, 388 U.S. 293, 302 (1967) is authority for rejecting petitioner's claim as to the witness Goeing. Stovall, supra, holds that where a potential witness at a criminal trial is in serious physical condition, it is not improper for the police to take a suspect to the hospital for the purpose of asking the witness whether he can identify the suspect. In the case at bar, Goeing was seriously injured, and we do not believe that the petitioner's constitutional rights were violated by the confrontation at the hospital, although Goeing did testify that petitioner was not asked to utter any words, whereas, in Stovall, supra, petitioner was asked to repeat the words which were uttered at the hold-up.

With respect to the testimony of Smith as to his out-of-court identification, there is no showing of undue suggestiveness such as occurred in Foster v. California, 394 U.S. 440 (1969) where the California witness identified the defendant only after two line-ups.

In the case of Neil v. Biggers, 409 U.S. 188, 198 (1972), the Supreme Court stated that "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification' (citing) Simmons v. United States, 390 U.S., at 384." In Neil v. Biggers, supra, at p. 199, the court set out the factors which are to be considered in evaluating the likelihood of misidentification, which "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation."

While applying these factors, we note that the crime occurred

in a well-lit store, that the witness Goeing's attention was of a very short duration but that he saw petitioner face-to-face and that Smith's attention was called by the announcement that there was a hold-up. We note that witness Smith, in his first description of the petitioner, believed him to be 30 to 35 years of age, whereas it developed that petitioner was only 17 years old. We note that Goeing was certain that the petitioner was the criminal at the time of confrontation, and that Smith, although not absolutely certain, became more so after the confrontation. We note also that the confrontations took place only two days after the crime.

Applying these factors, and the totality of the circumstances and rule referred to in Neil v. Biggers, supra, we are of the opinion that petitioner's due process rights were not violated by the identification procedures used.

The second argument made by petitioner relates to the closing statement of counsel for the Commonwealth. Over objections, he made the following remarks:

> Mr. Zollinger: ". . . I don't like to see anybody go to the penitentiary. The reason I don't like to see that is because they have to be there with people exactly like themselves. When they go to the penitentiary they are going to be in the same enclosure with people like themselves who haye no respect for the lives and the rights of others, for people who'll just as quickly take away his humanity as he's willing to take that away from other people. But, ladies and gentlemen of the jury that's exactly the kind of community he belongs in. He doesn't belong in the community where people go to work every day."
>
> Mr. Southard: "Your Honor, I'm going to object. I think this argument is out of the context of the evidence.
>
> The Court: "Overrule the objection.
>
> Mr. Southard: "Thank you.
>
> Mr. Zollinger: "He belongs in a community of people like himself, not out here where he's confronting people who work for a living. That don't go around packing guns, that aren't going into places where other people are working and pointing a gun at them and confronting them with death. That's strictly the conditions.
>
> "The only way that we can have any effect on the on the commission of crimes is to put these people in the community, off the street, out of our community. Put them in the community in which they belong and fix the sentence long enough, so long that you tell everybody in connection with the prisons and the authorities, from the

> Governor on down, that we don't want this man or men like him in our community. We want him out of here. And the only way you can get that message across is by fixing the sentences as long as you possibly can fix them. Fix those sentences so long that this man will be off the streets as long as we possibly can keep him off the streets." (Tr. 174-175).

> Mr. Zollinger: "And the kind of community that you will live in, that your children will live in, and your grandchildren will live in . . .I don't think you would prefer to have a community with people like this in it. This is your chance to get them out of here. This is your chance." (Tr. 176).

> Mr. Zollinger: ". . .don't think this is being harsh. This is the only way you can get the message across. These babies are tough. They don't care about the life or dignity or have any respect for other people. The only way you can get them to behave is to get tough with them." (Tr. 178).

The Supreme Court has held in Donnelly v. DeChristoforo, 416 U.S. 637 (1974) that where a habeas corpus petitioner alleges a deprivation of his due process rights by the improper conduct of a prosecutor, such allegation grants to the federal courts only the narrow one of due process review, and not the broad exercise of supervisory power that (it) would possess in regard to (its) own trial court'." See 416 U.S. at 642.

The petitioner here relies, to some extent, upon Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974). In that case, the prosecutor referred to petitioner's alleged prior involvement in criminal acts not charged in the indictment and not probative of either scheme or intent, and also boasted that he knew his questions were objectionable but even if stricken the jury would not forget them. He also made a prejudicial statement before the jury when he realized he would not be able to make a closing argument because petitioner's counsel had waived closing argument. The court held that these facts, combined with a possible violation of petitioner's Fourth Amendment rights, entitled petitioner to a hearing in the district court on his writ for habeas corpus.

United States v. Leon, 534 F.2d 667 (6th Cir. 1976) was a case involving the supervisory powers of the Court of Appeals and not the narrow power of due process review involved in a habeas corpus action.

There the court held that it considers "the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused." See 534 F.2d at p. 679.

In the case at bar, if we applied the tests set out in United States v. Leon, supra, we would hold that the remarks complained of were irrelevant and that they did not communicate to the jury any false information. They were fairly extensive and, of course, deliberately placed before the jury. The strength of the proof as to the guilt of the accused depended largely upon the testimony of eye witnesses Smith and Goeing, which we have previously discussed.

We have compared the closing statement of the prosecutor with the closing statement he made in the case of Morris E. Whiteside v. Donald E, Bordenkircher, 435 F.Supp. 68 (W.D. Ky. 1977). There the prosecutor intimated that the life of the only eye witness to the crime might have been threatened because she might have taken "her life in her hands" and "her testimony 'took courage' and that it was a problem getting victims of armed robberies to come into court because they were 'terrorized'." There was nothing in the record to substantiate those statements, and, in addition, the prosecutor made many references to the rising crime in the community and the inability of the courts to cope with it. A complete description of his conduct is set out on pages 69, 70 and 71 of 435 F.Supp.

We find that there is a substantial difference between the language used by the prosecutor in the case at bar, and that the petitioner has not met his burden of showing that the remarks of the prosecutor so infected the trial with unfairness as to make the resulting conviction a denial of due process. We find particularly pertinent in this context the statement made by the Supreme Court in Donnelly v. DeChristoforo, supra, at p. 647, "(t)he result reached by the Court of Appeals in this case leaves virtually meaningless

the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in Miller (Miller v. Pate, 386 U.S. 1 (1967)) and Brady, supra, (Brady v. Maryland, 373 U.S. 83 (1963)) to amount to a denial of constitutional due process."

In evaluating the remarks of a prosecutor, the question of whether or not his conduct so infects the trial with unfairness as to make the resulting conviction the denial of due process is not always easy of resolution. This is the case here, since the prosecutor did make several rather emotional remarks about the alleged duties of the jury to cleanse the community of the criminal element who "go around packing guns". However, the evidence is ample that the defendant was, in fact, pointing a gun at the witnesses and, in fact, shot one of them, and since there is no reference made by the prosecutor which was misleading as to any significant fact, and no denial of any specific rights under any specific provision of the Bill of Rights, we hold that petitioner's writ for habeas corpus must be denied.

We note, in passing, that the prosecutor's erroneous remark concerning whether or not the petitioner and his friends were with a girl on the night of the crime was of little or no significance, and that no objection was made to the comment made by the prosecutor.

A summary judgment in accordance with this opinion as has day been entered.

Dated 9-28-78

Charles M. Allen
United States District Judge

cc: Counsel of Record

ENTERED
Sept 29, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

JOHN GREGORY WATKINS,
Petitioner,

v.

DONALD BORDENKIRCHER, Warden
Kentucky State Penitentiary,
Respondent.

CIVIL ACTION

No. C 78-0241 L(A)

SUMMARY JUDGMENT

This action, having been submitted to the Court on the motion of respondent, Donald Bordenkircher, for summary judgment, and the Court, being of the opinion that there are no genuine issues of material fact and that respondent is entitled as a matter of law to summary judgment, and the Court, having filed its memorandum opinion,

IT IS ORDERED AND ADJUDGED that the motion of the respondent for summary judgment be and it is hereby sustained, and the complaint of the plaintiff is dismissed with prejudice.

This is a final and appealable judgment and there is no just cause for delay.

Dated 9-28-78

Charles M. Allen
United States District Judge

cc: Counsel of Record

ENTERED
Sept. 28, 1978
CLERK
DEPUTY CLERK

John Gregory WATKINS, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Supreme Court of Kentucky.

May 2, 1978.

Defendant was convicted before the Jefferson Circuit Court, George H. Kunzman, J., of robbery in the first degree and first-degree assault and he appealed. The Supreme Court, Clayton, J., held that: (1) failure to suppress identification testimony did not prejudice defendant; (2) trial court did not err in permitting prosecutor to amend indictment at close of case to change name of victim, and (3) use of defendant's previous statements for impeachment purposes was proper.

Affirmed.

1. Criminal Law ⇐1168(1)

Denial of defendant's pretrial motion for suppression hearing on identification testimony in prosecution for robbery and assault did not require reversal of conviction where testimony by victims failed to show any impermissible suggestiveness in identification of defendant which would have prejudiced defendant's right to fair trial.

2. Criminal Law ⇐170, 1167(4)

Amendment of indictment at close of prosecution's case to change name of victim of robbery did not prejudice defendant where defendant testified he had not been present at scene of crime; there was no violation of protection against double jeopardy and defendant was not denied a fair trial. RCr 6.16.

3. Witnesses ⇐380(2)

In prosecution for robbery and assault, trial court did not err in permitting prior statements made by defendant regarding his whereabouts on night of offense into evidence for purposes of impeachment.

John B. Southard, Jr., Asst. Public Defender, Terrence R. Fitzgerald, Deputy Public Defender, Louisville, for appellant.

Robert F. Stephens, Atty. Gen., Victor Fox, Asst. Atty. Gen., Frankfort, for appellee.

CLAYTON, Justice.

The appellant, John Gregory Watkins, was convicted of robbery in the first degree and first-degree assault and was sentenced to 20 years on each charge.

On January 11, 1975, an attempted robbery occurred at Thoroughbred Liquor Store in Louisville, Kentucky. Walter Smith and Donald L. Goeing, Sr., were working in the store when at approximately 11:30 p. m., three or four black males entered the store. Smith testified that one of them walked up to the counter and asked for a pack of cigarettes. When Smith turned around, the man said, "This is a holdup." Goeing was refilling the soda machine at this time and when the assailant saw some movement in that direction, he stated, "I said, don't reach for anything," and fired two shots at Goeing. One shot hit Goeing in the arm and the other went through the right ventricle of his heart. Goeing was hospitalized for 12 days and recovered after a 3½-month convalescence.

The evidence against the appellant was based on identifications made by Smith and Goeing. Defense counsel submitted a written pretrial motion for a suppression hearing on the identification testimony. Before any evidence was heard, this motion was reasserted in court, out of the presence of the jury, and was denied. Prior to testimony and identification by Smith and Goeing, defense counsel objected to not being allowed an in-camera hearing, since it forced him to explore the circumstances of the identification testimony in the presence of the jury, but was overruled. The defense repeatedly moved for a mistrial on this point and again was denied. The appellant was then taken to the hospital in the custody of two police officers and was identified by Goeing from his hospital bed.

[1] Appellant's first assignment of error is that the refusal of the trial court to conduct a suppression hearing to review the procedures by which the appellant was identified and the failure to suppress such identification testimony deprived him of a fair trial. This court stated in *Ray v. Commonwealth*, Ky., 550 S.W.2d 482, 483 (1977): "Although we are of the opinion that the holding of such a hearing prior to the introduction of this testimony would have been the preferred course to follow, we are not persuaded the failure to have done so requires reversal of appellant's conviction." We are persuaded that the identification evidence fails to raise any impermissible suggestiveness and the appellant was in no way prejudiced. We are further convinced that under the "totality of the circumstances" appellant received a fair trial.

[2] Appellant's next assignment of error is that the court erroneously permitted the prosecutor to amend the indictment at the close of the evidence and thereby exposed the appellant to double jeopardy and denied him a fair trial. At the close of the proof for the Commonwealth, the prosecutor moved to amend the indictment to charge the appellant with the robbery of Walter Smith instead of Donald Goeing. As stated by the appellant in his brief, the question is whether the amendment of the indictment violated the constitutional protection against double jeopardy and denied Watkins a fair trial. We see no prejudice in merely changing the names of the victims. The appellant testified that he was not even present at the scene of the crime. How could he have been prejudiced? RCr 6.16 permits the court to amend the indictment prior to the verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. *See also Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[3] The appellant's next assignment of error is that the admission into evidence of statements containing references to other offenses deprived the appellant of a fair trial. This court is, however, of the opinion that the trial court did not err in permitting appellant's previous statements into evidence for purposes of impeachment. See discussion in *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). In an oral statement made to the investigating officer on the night of the alleged offense, the appellant stated that he spent the entire night at his relatives' house. Subsequently he made a written statement saying that he was at a pool hall in the area of the Thoroughbred Liquor Store on the evening of the robbery attempt. The testimony relating to other offenses was activity unrelated to the appellant but was that of other individuals not on trial.

Appellant's final assignment of error is that the closing argument of the Commonwealth's Attorney deprived him of his right to a fair trial. We have studied the evidence relating to this argument and find it to be without merit and that the final argument of the Commonwealth's Attorney was within the bounds of propriety.

The judgment is affirmed.

All concur.

Elmer L. BLAIR, Movant,

v.

GENERAL ELECTRIC COMPANY and Workmen's Compensation Board of Kentucky, Respondent.

Supreme Court of Kentucky.

May 2, 1978.

In workmen's compensation case, claimant, a die setter, appealed from a judgment of the Jefferson Circuit Court, Common Pleas, First Division, Michael O. McDonald, J., which affirmed award of

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH

DIVISION NO. 16

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS

JUDGMENT

JOHN GREGORY WATKINS DEFENDANT

* * * * * * * * * * * * *

AT A COURT HELD JULY 15, 1977

This day, the defendant was brought into court by the Sheriff. Comes his attorney Mr. Southard, Public Defender. This case being called on the defendants written motion for a new tria herein, the court being advised, overrules said motion herein. Th case also being called on the defendants motion to withhold the rendition of judgment heretofore entered herein, the court having received a presentencing report and having considered same and further having provided the defendant with information contained therein, overrules said motion because the defendant is in need of Correctional treatment that can be provided most effectively by his committment to a Correctional Institution. The defendant w advised of his legal right to appeal this judgment and if he coul not afford counsel, the court would appoint him counsel and if indigent will be allowed to proceed in forma pauperis, the defend acknowledge receipt of said information contained herein. The defendant was asked if he had any legal cause to show why judgmen should not be pronounced against him; upon advise of counsel, none being shown, it is ordered and adjudged that the defendant being _____years of age, be taken by the Sheriff of Jefferson County to the jail of Jefferson County and from there by the Sheriff of said County and transferred to the custody of the Department of Corrections at such location as the Department sha designate and remain in their custody for a period of not more than twenty years as to each count to run concurrent. Comes the Defendant and files his written notice of appeal herein. Comes the defendant by counsel, and filed his written motion to proceed in forma pauperis, the court being advised, sustains said motion herein. Ordered that the defendant be and is remanded to jail.

NO. 156242

JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH
DIVISION NO. 16

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS

JUDGMENT

JOHN GREGORY WATKINS — DEFENDANT

* * * * * * * * * * * * *

AT A COURT HELD JULY 15, 1977

This day, the defendant was brought into court by the Sheriff. Comes his attorney Mr. Southard, Public Defender. Thi case being called on the defendants written motion for a new trial herein, the court being advised, overrules said motion herein. Thi case also being called on the defendants motion to withhold the rendition of judgment heretofore entered herein, the court having received a presentencing report and having considered same and further having provided the defendant with information contained therein, overrules said motion because the defendant is in need of Correctional TReatment that can be provided most effectively by his committment to a Correctional Institution. The defendant wa advised of his legal right to appeal this judgment and if he could not afford counsel, the court would appoint him counsel and if indigent will be allowed to proceed in forma pauperis, the defenda acknowledged receipt of said information contained herein. The defendant was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advise of counsel, none being shown, it is ordered and adjudged that the defendant being _____years of age, be taken by the Sheriff of Jefferson County to the jail of Jefferson County and from there by the Sheriff of said County and transferred to the custody of the Department of Corrections at such location as the Department shall designate and remain in their custody for a period of not more than five years to run consecutive with #153965. Comes the defendant and files his written notice of appeal herein. Comes the defendant by counsel, and files his written motion to proceed in forma pauperis, the court being advised, sustains said motion herein. Ordered that the defendant be and is remanded to jail.